No. 89-1317

FILED
MAR 23 1990
JOSEPH F. SAPNIOL,
CLERK

In The

Supreme Court of the United States

October Term, 1989

NATIONAL SHOPMEN PENSION FUND,

Petitioner,

v.

REUBEN McDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, AND HENRY MOSER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

*NEAL S. DUDOVITZ
GILL DEFORD
NATIONAL SENIOR CITIZENS LAW CENTER
1052 W. 6th Street, Suite 700
Los Angeles, CA 90017
(213) 482-3550

ALFRED H. SIGMAN
JEFFREY LEWIS
SIGMAN & LEWIS
436 14th Street, Suite 1020
Oakland, CA 94612
(415) 839-6824

JOHN E. IVERSON
THAO TIEDT
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101
(206) 464-4224

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the lower courts were correct in prohibiting pension fund trustees from reducing vested pensions when the trustees failed to present evidence to support the need for cutbacks.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE FUND MISSTATES THE NATURE OF THE HOLDING BELOW, WHICH PRESENTS NO GROUNDS FOR REVIEW 4

II. DIFFERENT QUESTIONS IMPLICATING DIFFERENT STANDARDS WERE RAISED IN *STEWART* AND *McDANIEL* 7

III. THIS UNUSUAL SITUATION IS NOT DESERVING OF SUPREME COURT REVIEW 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986) 6

Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572 (11th Cir. 1987), cert. denied, 108 S. Ct. 698 (1988) 5

Elser v. I.A.M. National Pension Fund, 684 F.2d 648 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983) 6

Fentron Industries, Inc. v. National Shopmen Pension Fund, 2 E.B.C. 1121 (W.D.Wash. 1981), aff'd, 674 F.2d 1300 (9th Cir. 1982) 1, 2

Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948 (1989) 8

Roark v. Lewis, 401 F.2d 425 (D.C.Cir. 1968) 5

Stewart v. National Shopmen Pension Fund, 795 F.2d 1079 (D.C.Cir. 1986) 7, 8, 9

STATUTES

29 United States Code

§ 185 3

§ 186(c)(5) 3

§ 1053(a)(3)(E) 8

§ 1053(a)(3)(E)(i) 7

§ 1054(g) 3

§ 1104(a)(1) 3

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ... 2, 3, 10, 11

In The

Supreme Court of the United States

October Term, 1989

No. 89-1317

NATIONAL SHOPMEN PENSION FUND,

Petitioner,

v.

REUBEN McDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, AND HENRY MOSER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. In 1977, the National Shopmen Pension Fund (Fund) refused to accept pension contributions from Fentron Industries of Seattle (Fentron) after expiration of a collective bargaining agreement between Fentron and the local shopmen's union. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1302 (9th Cir. 1982). The Fund's trustees then applied § 2.09 of their pension plan to eliminate the "past service" credits of Fentron retirees and employees, with the result that they were divested of their pensions. *Id.* at 1303. In the ensuing lawsuit, the district court enjoined the Fund's action on

the ground that the application of § 2.09 impermissibly deprived the retirees and employees of vested rights under the Employee Retirement Income Security Act of 1974 (ERISA), and the court of appeals affirmed. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 2 E.B.C. 1121 (W.D.Wash. 1981), aff'd, 674 F.2d 1300 (9th Cir. 1982). The Fund did not seek review of that decision.

In the meantime, Congress had passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. No. 96-364, 94 Stat. 1208, which required employers withdrawing from a pension plan to fund a proportionate share of unfunded liabilities. Its purpose was to protect pension funds from actuarial risks caused by a series of withdrawing employers. Unfazed by this development, the trustees, after the *Fentron* appellate ruling, applied another plan provision, § 2.10. Application of this provision, which the trustees had never used in the context of withdrawing employers (Pet. App. 30a), reduced pension benefits to Fentron employees and retirees by lowering the benefit rate. In deciding to employ it, the trustees relied solely on the determination that Fentron's withdrawal had created a liability, without attempting to determine the effect of that liability on the fund's financial integrity. Pet. App. 31a.

2. The predictable response was this successor litigation, in which the class of about ninety employees, retirees, and their survivors (Pet. App. 6a) challenged the use of § 2.10 on a variety of grounds. In 1985, the district court ruled in their favor on one contention, holding that the language of § 2.10 limited its application to discrete circumstances which did not include instances of withdrawing employers. Pet. App. 6a-13a. The court's injunction restored full benefits to the class members, retroactive to September 1982, the point at which the trustees had applied § 2.10. The Ninth Circuit reversed, however, holding that, although the retirees' reading was "logical and highly persuasive" (Pet. App. 19a), it was "not unreasonable" to construe § 2.10 to apply in situations involving employers who ceased to contribute. Pet. App. 23a.

3. On remand, the district court held that the trustees' application of § 2.10 was in conflict with federal law in three other separate ways: 1) by unilaterally decreasing retirees' vested pensions, the trustees violated § 301 of the Taft-Hartley Act, 29 U.S.C. § 185; 2) by failing to provide a summary plan description informing participants of the potential application and effect of § 2.10, the trustees violated their fiduciary duties under ERISA; and 3) by failing to demonstrate that their arbitrary and capricious conduct "was necessary to maintain the financial integrity of the Fund as a whole," the trustees violated § 302(c)(5) of the Taft-Hartley Act and § 404(a)(1) of ERISA, 29 U.S.C. §§ 186(c)(5), 1104(a)(1). Pet. App. 28a-34a. The judge did agree with the trustees, however, that their action did not violate 29 U.S.C. § 1054(g), which prohibits plan amendments decreasing accrued benefits without approval from the Secretary of Labor. Pet. App. 25a-27a.

4. On the Fund's appeal, the court of appeals did not reach all four of these issues. Instead, it affirmed solely on the claim that the trustees had failed to present an actuarial need for their action. Pet. App. 3a-4a.

Relying on two previous decisions where it had reached a similar conclusion, the court, in a unanimous *per curiam* decision, reiterated that "a multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered." Pet. App. 4a. In this case, "the record contains no evidence that unfunded obligations to Fentron's employees threatened the financial integrity of the Fund." Pet. App. 4a. Moreover, the court noted that passage of MPPAA "protects funds from having unfunded liabilities dumped upon them by departing employers," so that the trustees here could not contend that their actions were necessary to discourage other employers from withdrawing. Pet. App. 4a.

On November 20, 1989, the panel unanimously denied the trustees' request for rehearing, and no members of the panel or of the court as a whole requested a vote on the suggestion for rehearing *en banc*. Pet. App. 5a.

REASONS FOR DENYING THE WRIT

I. THE FUND MISSTATES THE NATURE OF THE HOLDING BELOW, WHICH PRESENTS NO GROUNDS FOR REVIEW

In an effort to suggest a compelling need for this Court's review, the Fund consistently misstates the nature of the holding below. It begins by contending in the Question Presented that the court of appeals' analysis requires a finding adverse to the trustees "unless the Trustees prove that the plan would become 'financially unstable' but for the specific application [of the plan provision]." Pet. i. Throughout the petition, the Fund describes the decision below in the same terms, using the expression "financially unstable" with such talismanic fervor as to suggest that it was the linchpin of the decision below.[1] The court's alleged approach, the Fund concludes, represents "an entirely new standard of judicial review." Pet. 15.

Neither the Fund's synopsis of the court of appeals' holding nor the conclusion as to its alleged significance is accurate. The Ninth Circuit did not remotely imply that "the enforcement of a plan rule that results in the reduction or loss of benefits may occur *only* if the fund would become financially unstable but for the specific application of the rule." Pet. 21 (emphasis in original). Furthermore, the court's holding does not establish a "new standard of judicial review."

Rather, the court of appeals, carefully following precedent directly on point and recently reiterated, offered this as the standard by which the trustees' action in

---

[1] The words "financially unstable" never appear in the lower court's opinion, but the Fund employs that expression, usually in quotes, on seven occasions. Pet. i, 14, 21 (twice), 23, 27 (twice).

reducing retirement benefits should be judged: "[A] multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered." Pet. App. 4a. Demonstrating that the Fund's "overall financial stability" is "endangered" is a considerably less onerous burden than demonstrating that Fentron's action itself would have "caused the plan to become financially unstable," as the Fund's version of the Ninth Circuit's standard would require. Pet. 14.

Since the Fund defines "financially unstable" to mean "actuarially insolvent",[2] it is accusing the appellate court of establishing a standard which allows the trustees to prevail only if they can demonstrate a causal link between the employer's withdrawal and the demise of the Fund. Not surprisingly, the Fund finds this approach astonishing, unsupportable, and worthy of strong imagery:

> The Ninth Circuit's requirement that trustees wait until *a fiscal catastrophe has actually occurred* before they may take remedial steps simply defies common sense. It is equivalent to prohibiting a physician from treating a hemorrhaging patient until after the patient has died from loss of blood.

Pet. 25 (emphasis supplied).

This view is inaccurate. The lower courts in this case applied a long-standing principle for reviewing trustees' satisfaction of their fiduciary duties,[3] using a typical standard for a benefit cutback situation.[4] Once the retirees

---

[2] Pet. 14 n.19; see also, *e.g.*, Pet. 23 (using "financially unstable" and "actuarially insolvent" interchangeably in consecutive sentences).

[3] See, *e.g.*, *Roark v. Lewis*, 401 F.2d 425, 429 (D.C.Cir. 1968) ("the burden is on the trustees to show some rational nexus between the Fund's purpose and the requirement").

[4] See *Deak v. Masters, Mates & Pilots Pension Plan*, 821 F.2d 572, 578 (11th Cir. 1987), cert. denied, 108 S.Ct. 698 (1988);

(Continued on following page)

established that the reduction in benefits was arbitrary and capricious (Pet. App. 30a), the Fund had the opportunity to justify those retirement reductions by proving that they were needed in order to counter a threat to the Fund's overall actuarial soundness. The Fund's only proffered evidence, however, was to show that some liability was created by the cessation of Fentron's contributions. Pet. App. 30a.

That alone is insufficient, for it proves nothing about the impact of Fentron's withdrawal on the Fund's financial integrity. As the district court observed, the trustees never "contend[ed] that [the] actuarial soundness of the Fund as a whole was dependent upon application of section 2.10 to Fentron employees." Pet. App. 31a; see also Pet. App. 4a. Indeed, the Fund's actuary testified that its unfunded liability significantly *decreased* in the years between Fentron's withdrawal and the application of § 2.10, and was relatively low for funds of comparable size at the time of the application.[5]

The district court and court of appeals applied traditional principles in a logical manner. To borrow from the Fund's colorful anthropomorphic analogy: the standard followed by the courts below is that the doctor should not amputate when the wound is healing on its own.

(Continued from previous page)

Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1038 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983).

[5] Deposition of Thomas Levy, at 40.7-40.10, 44.1-44.5, taken on January 24, 1985 in *McDaniel v. National Shopmen Pension Fund*, No. C83-1484C (W.D.Wash.).

II. DIFFERENT QUESTIONS IMPLICATING DIFFERENT STANDARDS WERE RAISED IN *STEWART* AND *McDANIEL*

The Fund places considerable reliance on the alleged split in the circuits between the decision below and *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C.Cir. 1986). There are significant differences between the cases, however, which indicate that different questions were posed to the two courts, producing variations in the analyses.

1. Although the Fund acknowledges that different plan rules were at issue in the two cases (Pet. 21 n.29), it fails to recognize the significance of that point. In addition to the disparate circumstances in which §§ 2.09 and 2.10 are usually invoked, the consequences of the two rules are considerably different. The former allows the trustees to eliminate past service credits, while "[s]ection 2.10 . . . empowers the Trustees to scale back the benefit level associated with an earlier (lower) contribution rate. . . ." Pet. 8.

This distinction is crucial because the right to eliminate past service credits, at issue in *Stewart*, is expressly permitted by ERISA, 29 U.S.C. § 1053(a)(3)(E)(i). By contrast, there is no authority in ERISA for reducing benefit levels, which was the action taken here.

The Fund emphasizes the purportedly complementary nature of the two plan provisions, claiming that both were intended to resolve problems caused when plans provide "retroactive benefits [which are] unearned." Pet. 5-6. It correctly observes that the law does not require a plan to provide either of these "retroactive benefits" (past service credits or higher benefit levels for earlier work periods). Pet. 6. But the Fund ignores the fact that, once such benefits are provided, ERISA authorizes eliminating or cutting back only one of these "unearned" benefits. Thus, while the Fund notes the similar goals of its two cutback provisions, it overlooks that those rules have irreconcilable statutory authorizations.

In his *Stewart* decision, Judge Silberman implied that *only* cutbacks authorized by ERISA are permitted: after quoting § 2.09, he observed that "[s]uch arrangements are permissible by virtue of a provision of ERISA, 29 U.S.C. § 1053(a)(3)(E) (1982)." Pet. App. 37a n.1. At the very least, the fact that one cutback mechanism is expressly permitted by the authorizing statute, while the other is not, suggests the propriety of applying different fiduciary standards when trustees invoke their discretion to employ different reduction rules.

Since ERISA explicitly allows trustees not to recognize past service credits in appropriate circumstances, it is not unreasonable to allow trustees considerable leeway in implementing such cutbacks. But, when the reduction is not authorized by ERISA's specific provisions, it is compatible with the statute's fiduciary obligations to require trustees to demonstrate the actuarial necessity for the action. Because Congress has spoken directly on the propriety of one type of cutback, while remaining silent on another, the minimum conclusion is that basic fiduciary obligations must be satisfied before the latter action may be undertaken.

The standards of fiduciary duty applied by the court below and the *Stewart* court comport with that approach. Faced with different ERISA scenarios, the courts did not respond erratically.[6]

2. The other distinction between *Stewart* and *McDaniel* is a factual one to which Judge Silberman alluded. He noted that *Stewart* "would have [been] an entirely different case if [the retirees] had shown that the Fund's policy was inconsistently applied." Pet. App. 42a. In this case, inconsistency was a hallmark of the trustees' action.

---

[6] This Court has recently examined the nature of fiduciary obligation imposed on plan trustees by ERISA. *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 953-956 (1989). The court below was simply applying the relevant fiduciary rules to the trustees in this case.

That inconsistency inheres in the novel application of § 2.10 to the *McDaniel* class members. The district court emphasized this point:

> [T]he trustees' use of section 2.10 to reduce the Fentron employees' benefits [is] especially arbitrary and capricious because this was the only instance in which the trustees used section 2.10 to decrease the benefits of a withdrawing employer's employees.

Pet. App. 30a; see also Pet. App. 9a (original district court decision); Pet. App. 22a (original court of appeals decision).

Although the original *McDaniel* appellate decision established that § 2.10 could be interpreted to apply in instances of withdrawing employers, the language of the rule strongly suggests that its drafters never contemplated its application to that situation. See Pet. 8 & nn.10,11; Pet. App. 9a-10a (original district court decision explaining why § 2.10 appeared not applicable to withdrawing employers). Thus, the trustees have applied a rule which was apparently drafted with other considerations in mind and which had never before (and, as far as is known, has never since) been employed in this context.

That the rule could conceivably be stretched to cover this situation does not suggest that, when it is used in this extraordinary manner, the trustees have unbridled discretion. In *Stewart*, § 2.09 was employed in the circumstance for which it was designed. But, here, the unprecedented use of § 2.10 indicates precisely the kind of inconsistent application to which Judge Silberman was alluding. Given that deviation, it is entirely appropriate to apply a somewhat more demanding standard of fiduciary obligation.

The two cases raise different legal questions in different factual settings. That the court below exacted a higher degree of fiduciary obligation does not describe a split in the circuits, but merely reflects those differences.

III. THIS UNUSUAL SITUATION IS NOT DESERVING OF SUPREME COURT REVIEW

1. This situation will not be repeated. After Fentron's cessation of contributions, Congress passed MPPAA, which, as the court below explained, requires

> employers who withdraw from multiemployer funds . . . to fund their proportionate share of the plan's unfunded benefit obligations. By requiring employers to make up any shortfall in contributions when they withdraw from a pension fund, the 1981 legislation protects funds from having unfunded liabilities dumped upon them by departing employers.

Pet. App. 4a (citation omitted). Fentron itself could not be affected by this legislation, which was not retroactive, but MPPAA does render it extremely unlikely that future withdrawals will cause unfunded liabilities. Consequently, the decision below, even if it did create a split in the circuits, will not have a prospective effect; pension funds will have no need to reduce retirees' benefits, for the liability will fall where it should, on the withdrawing employer.

The Fund contends, however, that MPPAA's impact is minor, premising its argument on unsupported allegations about employers' inability to satisfy their withdrawal liability. Pet. 24-25. It offers no factual basis in the record for this contention; to the contrary, it is left to speculate about "another large [withdrawing] employer . . . from whom withdrawal liability *might* well prove uncollectible. . . ." Pet. 25 (emphasis supplied). In short, there is no evidence that a significant number of withdrawing employers are or will be unable to satisfy their obligations, and, accordingly, no indication that MPPAA has failed in its object of placing the burden of unfunded liabilities on the withdrawing employers.

Moreover, even if the Fund's unsubstantiated allegations about MPPAA's effect had some factual basis, this is not the appropriate case for considering the issue. The Fund's attempt to undercut the impact of MPPAA is

premised on withdrawing employers who "have ceased to be economically viable." Pet. 24. But there is no suggestion that Fentron was in that position; its withdrawal was occasioned by other factors. If the Court wishes to consider the proper scope of trustee reaction to bankrupt withdrawing employers, it should review a case with that fact pattern.

In light of MPPAA, it is impossible for a solvent withdrawing employer to avoid paying its share of a plan's unfunded liabilities. As a result, this case will definitely not reoccur, and it is therefore an inappropriate vehicle for resolving the issue raised by the Fund.

2. This petition is the culmination of events which began thirteen years ago, when, in the course of a labor dispute (Pet. App. 7a), the Fund chose not to accept further contributions from a previously contributing employer. Thus, a disagreement between the employer and the union led to the pension fund attempting to eliminate the vested pension rights of the employer's work force.

The instant case is the continuation of the lawsuit filed in January 1979 to challenge that action; on three occasions, the district court has ruled in the retirees' favor, and, on two of the Fund's three appeals, the court of appeals has agreed. As a consequence of this protracted dispute, the 90-odd class members have received all of their benefits – but never with the assurance that the matter had been resolved and that the Fund could not seek to recover the benefits paid out.

Granting the petition would delay resolution of the issue decided below for another year. Moreover, the court of appeals has yet even to consider three more claims resolved by the district court, so that, even if this Court were to rule adversely to the retirees, the matter could drag on for years more. No purpose is served by perpetuating it.

The time has come for this litigation to be terminated, so that the uncertainty which has plagued these elderly workers and their survivors for well over a decade may be concluded. Even if the Fund could muster a more

compelling argument for review, it would still be appropriate to deny the petition. The Fund has grasped every opportunity to deprive Fentron retirees of their benefits, but it has been repeatedly rebuffed. The matter should now be brought to a close.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NEAL S. DUDOVITZ
GILL DEFORD
ALFRED H. SIGMAN
JEFFREY LEWIS
JOHN IVERSON
THAO TIEDT

March 1990